NO. 46366-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

HAROLD SPENCER GEORGE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 13-1-03842-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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[1] ***State v. Petrich***, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged with four counts of second degree child rape (Counts I-IV), as well as one count of second degree child molestation (Count V) for repeatedly raping, and molesting, his daughter's developmentally disabled twelve year old friend. CP 4-5, 12-15. Each offense was aggravated by his knowledge of her particular vulnerability while the child rapes were also aggravated by their protracted occurrence. *Id.* Defense counsel's performance was twice complemented by the judge for the trial that followed. RP (5/9) 10; RP (9/12) 32. A properly instructed jury convicted defendant as charged. CP 19-28, 29-64. At sentencing his then fourteen year old victim bravely described the impact of his crimes:

> "[I] sometimes have thoughts of suicide because I can't live with what he did. I am always depressed. People try to cheer me up. It doesn't always work. I am always angry when people try to talk to me about it because I don't like talking about it. My whole life has changed because of what he did. I don't think that[sic] would ever change back to the way it was." RP (5/12) 26; 3RP 90; CP 65.

A 420 month exceptional sentence was imposed based on the factually supported aggravators, as well as defendant's history of child sex crimes, which resulted in an offender score of 30. CP 12-15, 37, 68; RP (9/12) 32-33. Defendant's notice of appeal was timely filed. CP 90.

2. Facts

Defendant was thirty four years old when he first gained access to C.D. through her friendship with his daughter, his son's dating relationship with C.D.'s older sister, and the resulting familiarity with C.D.'s father. 2RP 76; 3RP 90-93, 140, 142, 144, 162. C.D.'s family lived about five minutes away from defendant's family in Graham, Washington. 3RP 93, 140-41. She was a "developmentally disabled" twelve year old special education elementary school student with a speech impediment who often obviously functioned at the developmental level of a nine year old. 3RP 90, 144-46, 177-78. The disability affected her capacity to comprehend basic concepts, requiring others to find special ways of explaining them to her. 3RP 145-46. She was held back in the third grade due to her inability to communicate with others. 3RP 145. Defendant exploited her availability and disability for sex over a four month period when her single father was mostly sleeping or working outside the home as a "24/7" on-call tow truck operator. 3RP 94-99, 141, 163, 176.

Defendant first exploited C.D. for sexual gratification December 24, 2012, when she was in fifth grade. 3RP 94-96, 99.[2] At the time he had periodically stayed at her family's house due to his marital problems with

[2] C.D.'s father initially could not recall whether defendant spent the night Christmas Eve. 3RP 143, 158-59. He eventually said defendant did not, but there was confusion as to which day was being discussed. 3RP 160. He conceded his work left him sleep deprived with a sense of one day indistinguishably running into the next. 3RP 163-64.

Mary Moran-George. 3RP 134, 142-44. C.D. awoke on one of those occasions to have defendant pull her clothing down to her knees so he could touch the outside of her vagina with his hand for about ten minutes as his own teenage son slept on a nearby blanket beside a friend. 3RP 94-97. C.D. was "too drowsy" to talk. 3RP 98. Defendant went to the bathroom when he was done. 3RP 97. C.D. was afraid to report the abuse. 3RP 99.

Defendant first escalated to using C.D. for vaginal intercourse roughly one month later when she was visiting his property for a campfire party. 3RP 99-101.[3] She went to sleep in a trailer near the campfire. 3RP 99. Defendant's son "passed out" elsewhere in the trailer. 3RP 116, 137. Sometime later defendant came into C.D.'s bed while she was sleeping. 3RP 99-100, 117-18. He took off her clothes, pulled her over him, and put his penis inside her. 3RP 101-02. C.D. never had intercourse before. 3RP 111, 180. At first all she felt was pain. 3RP 111. Yet she did not cry out as "he was so close ... [she] thought he was going to hurt [her]." 3RP 130. After about three minutes, he withdrew his penis, put her on her back, "got on top of" her, then reinserted his penis into her vagina. 3RP 102-03. As morning approached he woke up and did it again. 3RP 104.

Over the next several weeks defendant used C.D. for sex in her

[3] C.D.'s father indicated C.D. was not at a campfire party, but defense counsel was never specific as to the party being discussed, and C.D.'s father acknowledged she was at defendant's house most weekends. 3RP 144, 166.

room, his garage, and his house. 3RP 104-05. She was cleaning her bed when defendant initiated the intercourse in her room. 3RP 106-07. He turned her around, pulled her pants off, sat her on the bed, then inserted his penis into her vagina. 3RP 106.

Defendant next used C.D. for vaginal intercourse in his detached garage, where he raped her approximately ten times. 3RP 107. Under the pretext of picking her up to play with his daughter, he drove C.D. into the garage, locked the doors, took her pants off, and vaginally raped her on the concrete floor as his daughter waited for her in the house. 3RP 108-09, 128, 131, 133-34. Defendant allowed C.D. to go inside to play with his daughter once he was through. 3RP 133. C.D. held her tears back until she was alone. 3RP 133.

On approximately twelve different occasions defendant used C.D. for sex in two separate rooms of his house when she was purportedly there to spend the night with his daughter. 3RP 109-10, 144. The pain C.D. first felt abated as the rapes continued; but her nightmares remained. 3RP 111, 129. Meanwhile defendant talked to C.D. about sex, stating "he would teach [her] everything he has to." 3RP 112. Defendant ultimately raped C.D. approximately 25 times during his access to her; however, the details of each rape blurred through repetition. 3RP 112. She remained too frightened to tell anyone until her father confronted her about the abuse following an April, 2013, conversation with defendant's wife. 3RP 111,

134, 147-148.

C.D.'s father immediately reported the sexual abuse to police. 3RP 113, 148. She was forensically interviewed before being examined by the Director of Child Abuse Intervention at Mary Bridge Children's Hospital. 2RP 77-78; 3RP 114, 149. C.D. was worried defendant might have impregnated her or given her a sexually transmitted disease since he never wore protection during the rapes. 3RP 180, 186. A rare type of transection (or definite tear) consistent with penetrating trauma was discovered on her hymen. 3RP 181, 183-84, 187.

C. ARGUMENT.

1. THE EVIDENCE SUPPORTS DEFENDANT'S SECOND DEGREE CHILD MOLESTATION AND RAPE CONVICTIONS AS IT PROVED HE MOLESTED AND REPEATEDLY RAPED A MENTALLY DISABLED TWELVE YEAR OLD WHEN HE WAS THIRTY FOUR YEARS OLD.

Equally reliable circumstantial and direct evidence is sufficient to support a conviction if it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt when viewed most favorably to the State. ***State v. White***, 150 Wn. App. 337, 342, 207 P.3d 1278 (2009)(citing ***State v. Thomas***, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Appellate courts defer to the trier of fact on issues of

conflicting testimony, witness credibility, and the persuasiveness of evidence. *Id.*

a. The evidence easily supports defendant's four counts of second degree child rape as it established he used C.D. for vaginal intercourse roughly twenty five times at four locations over as many months.

A person is guilty of rape of a child in the second degree when:

> "the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married or in a state registered domestic partnership with the perpetrator and the perpetrator is at least thirty-six months older than the victim. CP 39 (Instr. 8;WPIC 44.12), 45-48 (Instr. 14-17) ; RCW 9A.44.076(1)."

"Sexual intercourse" occurs upon any penetration, however slight. RCW 9A.44.010(1)(a)-(c); CP 40 (instr. 9).

Defendant vaguely asserts insufficient details were elicited to support the second degree child rape convictions. He is mistaken. C.D. was proved to be at least twelve, but less than fourteen, during the four month period in which the repeated rapes occurred just as defendant was proved to be at least thirty-six months older than her at his age of thirty four. 2RP 76; 3RP 90-93, 140, 142, 144, 162. Defendant was not married or in a state recognized domestic partnership with C.D.. 3RP 146. All the rapes occurred in Graham, Washington. 3RP 93, 140-41. At trial, C.D. described four rapes at what *should be* a disturbing level of detail. *E.g. supra*, p., 3-8. At a minimum, C.D. very definitely described being used

for vaginal intercourse twice in defendant's trailer, once in her bedroom, once on the concrete floor of his garage, as well as once in two separate rooms of his house. 3RP 99-104; 106-10, 128, 133-34, 144.

The jury also received general testimony recounting twenty one other rapes capable of supporting the convictions as C.D.'s estimates of the number of incidents with general accounts about the frequency of particular acts were specific enough to enable a defense. *E.g.*, 3RP 94-96, 99-104; 106-10, 128, 133-34, 144, 147-48; *see* ***State v. Hayes***, 81 Wn. App. 425, 435-436, 914 P.2d 788 (1996) (*citing* ***State v. Brown***, 55 Wn. App. 738, 741-742, 780 P.2d 880 (1989); ***People v. Jones***, 270 Cal.Rptr. 611, 623, 792 P.2d 643 (1990)). Such testimony is rightly recognized as sufficient for it is often unreasonable to require victims to pinpoint when repeated offenses occurred. *Id.* at 435-436 (citing ***State v. Ferguson***, 100 Wn.2d 131, 139, 667 P.2d 68 (1983)). To require more would incentivize perpetrators to insulate themselves from prosecution by reoffending until the sheer number of offenses overwhelmed their victims' capacity to compartmentalize each incident. *See Id.*; ***State v. Jensen***, 125 Wn. App. 319, 327-28, 104 P.3d 717 (2005); *see also* ***State v. Bobenhouse***, 166 Wn.2d 881, 885-886, 214 P.3d 907 (2009); ***State v. Allen***, 57 Wn. App. 134, 135-136, 787 P.2d 566 (1990). Defendant's convictions are founded upon a more detailed account of his prolific child rape than the law required of the mentally disabled child he chose to victimize.

b. Defendant's conviction for molesting C.D. on Christmas Eve is also well supported.

A person is guilty of child molestation in the second degree when:

> the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married or in a state registered domestic partnership with the perpetrator and the perpetrator is at least thirty-six months older than the victim. CP 49, 51; RCW 9A.44.086(1).

"Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party. RCW 9A.44.010(2); CP 50 (Instr.19; WPIC 45.07).

Defendant neglects to provide any authority or analysis to elucidate any aspect of his evidentiary challenge to the child molestation conviction, so it is undeserving of review. *See* ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); ***Saunders v. Lloyd's of London***, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); ***In re Marriage of Arvey***, 77 Wn. App. 817, 819 n. 1, 894 P.2d 1346 (1995). Each element of the offense was nevertheless proved. As with Counts I-IV, the requisite age, relationship, and jurisdictional elements are firmly supported. *E.g.*, 2RP 76; 3RP 90-93, 140, 142, 144, 162. And C.D. testified defendant put his hand on her vagina on Christmas Eve as his own son slept nearby beside a friend. 3RP 94-99.

2. DEFENDANT'S UNFAIR CRITICISMS OF HIS COUNSEL'S CONDUCT DO NOT ESTABLISH A CONSTITUTIONAL DEFICIENCY THAT ACTUALLY PREJUDICED HIS CASE.

To prevail on an ineffective assistance of counsel claim, a defendant must prove counsel's performance was deficient and the deficiency prejudiced the defense. ***State v. Garret***, 124 Wn.2d 504, 518, 881 P.2d 185 (1994)(citing ***Strickland v. Washington***, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)(citing U.S. Const. Amend. 6); *see also* Wash. Const. Art. I § 22). A court evaluating performance must make every effort to eliminate the distorting effects of hindsight. ***State v. Brown***, 159 Wn. App. 336, 371, 245 P.3d 776 (2011).

Counsel is only constitutionally deficient when presumptively reasonable representation is demonstrated to fall below an objective standard of reasonableness. ***State v. McFarland***, 127 Wn.2d 322, 335, 880 P.2d 1251 (1995); ***State v. Grier,*** 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). To rebut the presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate explanation for counsel's conduct. *See Id.* at 42. Even proof of demonstrable tactical errors will not support reversal so long as the adversarial testing envisioned by the Sixth Amendment occurred. ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).

Defendant levels a number of unwarranted criticisms at his counsel which do not support an ineffective assistance claim.

a. Counsel's unforeseeable need to postpone hearings to care for a hospitalized child, convalesce following illness, and appear in different courts did not result in ineffective assistance.

Counsel's unavailability due to illness or other court proceedings is grounds for a continuance or recess absent proof of substantial prejudice to the defendant. *See* ***State v. Chichester***, 141 Wn. App. 446, 454, 170 P.3d 583 (2007). In order to succeed on a claim counsel rendered ineffective assistance due to illness or preoccupation with personal matters, a defendant must point to specific errors which prejudiced the defense. *See e.g.*, ***Dows v. Wood***, 211 F.3d 480, 485 (9th Cir.2000); ***Smith v. Ylst***, 826 F.2d 872, 876 (9th Cir.1987); ***Buckelew v. United States***, 575 F.2d 515, 521 (5th Cir.1978) (claim attorney was "too old and sick" insufficient absent showing of specific prejudice resulting from alleged illness); ***Pilchak v. Camper***, 741 F.Supp. 782, 792–793 (W.D.Mo.1990).

Defendant's claim counsel was deficient due to scheduling conflicts casts her in an unduly negative light by presenting events out of context, yet fails to identify any specific prejudice resulting from the reasonable accommodations made for her unforeseeable circumstances. The scheduling difficulty on March 14th resulted from her "little boy['s] "hospitalization" for an "abscess"; the family continued to "fight"

following the child's release. 1RP 4-5, 11. The court responded by setting the non-essential status conference to March 21st "without consulting [counsel]", which counsel labored to attend despite having other hearings similarly rescheduled for that day by other courts. 1RP 11-12. No showing of resulting prejudice has been made.

Defendant next unjustifiably claims counsel was deficient for remaining home when she was stricken by an unexpected "severe sore throat [and] nausea", which he even acknowledged adversely affected her voice and appearance. 3RP 84-85. The court appropriately responded calling a one day recess, which defendant has not demonstrated to be prejudicial. 3RP 86-87.

Defendant also takes exception to counsel's illness-related absence on May 2, 2014; however, no deficiency is shown as the sentencing scheduled for that date was rescheduled to May 9, 2014, which was within the time allotted by the speedy sentencing rule.[4] RP (5/2) 3-5. Defendant criticizes counsel's need to send coverage to obtain another continuance on that date despite knowing the hearing was scheduled without regard to her schedule, and she could not appear after being ordered to answer a King County Jury's question thirty minutes before the hearing was to commence. RP (5/6) 6-8; (5/9) 7-8; (5/12) 16-17. Again, no prejudice is

[4] RCW 9.94A.500(1) (The sentencing hearing shall be held within forty court days following conviction).

shown since the court rescheduled sentencing to May 12, 2014, which was also within the time allotted for speedy sentencing. RP (5/12) 15, 34.

b. Defendant failed to prove deficient trial preparation prejudicial to the defense.

"Counsel is not expected to perform flawlessly ... with the highest degree of skill", so an ineffective assistance claim predicated on lack of preparation cannot succeed unless the lack of preparation "is so substantial ... no reasonably competent attorney would have performed in such manner." ***State v. Jury***, 19 Wn. App. 256, 264, 576 P.2d 1302 (1978). Appellate courts "note, with increasing concern, ... it seems to be standard ... for the accused ... to develop an undertone of studied antagonism ... or to be reluctant to ... cooperate in preparation of a defense ... to argue on appeal ... [he or she] ... was represented by incompetent counsel." ***In re Stenson***, 142 Wn.2d 710, 734, 16 P.3d 1(2001).

Defendant maintains without citation to the record counsel admitted to being unprepared for trial. App.17. The record does not support the allegation. Counsel visited defendant the night before trial as part of her "final preparation." 1RP 4. She demonstrated a comprehensive understanding of defendant's case based on representing him in two child sex cases with witnesses in common. 1RP 9-10, 12. Counsel only suspended work on the case one day to await the court's ruling on defendant's expressed decision to fire her just before trial. 1RP 8. Counsel was given the additional day she said she needed to complete preparation

once defendant's motion to discharge her was denied. 1RP 8, 17-18, 24. A defense trial memorandum containing several motions *in limine* reflecting a nuanced understanding of the case was filed the next day. CP 6-9; 2RP 33-37, 39, 44-49, 52-54, 57. Counsel was also able to cross-examine witnesses with interview transcripts defendant wrongly suggests were unavailable at trial despite defendant's failure to pay for them. 1RP 7; 3RP 119, 123-24, 137, 209. And the court twice commended counsel's handling of defendant's case. RP (5/9) 10; (5/12) 31-32.

c. Defendant failed to prove counsel was deficient for tactically reserving opening statement when the prospect of a defense case remained uncertain.

There are instances where reservation of the defense's opening statement until after the prosecution's case-in-chief may be proper. 13 WA PRAC § 4201, 4206. Not making an opening statement leaves a defendant uncommitted to a particular position; thereby, free to develop any defense that may materialize as the State presents its case. ***Jones v. Smith***, 772 F.2d 668, 674 (11thCir. 1985). "The timing of an opening statement, ... even the decision ... to make one at all, is ordinarily a mere matter of trial tactics ...[which] will not constitute [a] basis of [an] ineffective assistance [claim]". ***United States v. Ramirez***, 777 F.2d 454, 458 (9th Cir.,1985)(citing ***United States v. Murray***, 751 F.2d 1528, 1535 (9th Cir.1985); *see* ***States v. Salovitz***, 701 F.2d 17 (2d Cir. 1983)).

The record supports a reasonable inference counsel reserved opening to postpone the decision on whether to present witnesses until after the State's case-in-chief. Prior to reserving opening, counsel addressed the testimony of Mary Moran George—defendant's ex-wife and the mother of a child defendant was also convicted of sexually abusing. 1RP 9; (5/12) 32-33. When counsel learned the State might not call Moran-George as a witness, she reserved the right to do so, articulating defense's interest in Moran-George's testimony depended on the then unknown content of C.D.'s testimony. 2RP 61-62, 72. Calling Moran-George would have been a precarious defense tactic as it risked opening the door to defendant's sexual abuse of her daughter. 3RP 152. Defendant was still debating whether to call Moran-George or other witnesses when the State rested. 3RP 188-89. It was only after further deliberation counsel announced defendant's decision not to present a case. 3RP 189-90. Counsel nevertheless requested an opportunity to give an opening statement, which the trial court denied given the absence of a defense case to explain. 3RP 191. Defendant incorrectly describes counsel's conduct as wanting any tactical justification as she kept his strategic options open until the end of the case. That he was not ultimately permitted to take advantage of the flexibility and give what would have amounted to two closing arguments is, at best, proof of an unsuccessful tactic, which does not support his ineffective assistance claim. ***Grier***, 171 Wn.2d at 43.

d. Defendant's unfounded assumption counsel neglected to adequately investigate witnesses does not support an ineffective assistance claim.

"[T]here is no absolute requirement that defense counsel interview witnesses before trial." ***In re Pirtle***, 136 Wn.2d 467, 488, 965 P.2d 593 (1988). And a reviewing court may not consider matters outside the record when reviewing an ineffective assistance counsel claim. ***McFarland***, 127 Wn.2d at 335.

Defendant's entire basis for the claimed failure to interview witnesses is "[t]here is no indication ...[counsel] attempted to locate ... [or] investigate" two witnesses who were described as sleeping on the floor near C.D. when defendant molested her on Christmas Eve; one of whom was also passed out in the trailer where defendant first raped C.D.. *See* App.20. The patent flaw in defendant's position is there is equally no indication counsel failed to interview those witnesses, and it is defendant's burden to prove a deficient failure to conduct necessary interviews.

Imbedded in this assignment of error is an undeveloped claim counsel deficiently failed to request a missing witness instruction; however, those witnesses were sleeping when the sexual abuse occurred, so the instruction-requisite proof of their fundamental importance is not present. *E.g.*, 3RP 96-97, 136-37; ***State v. Blair***, 117 Wn.2d 488-89, 816 P.2d 718 (1991). There is also nothing to support an inference they were particularly available to the State, as the witness in common to the

molestation and rape appears to be defendant's son, and the other person his son's friend. *E.g.*, 3RP 96-97, 116, 136-37.

e. Defendant has not established an ineffective failure to object to admissible *res gestae* of the events leading to the discovery of defendant's crimes.

The decision when or whether to object is a classic example of trial tactics. Only egregious failures to object are constitutionally deficient. ***State v. Madison***, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). To prevail on such a claim the defendant must prove: (1) an absence of legitimate strategic or tactical reasons; (2) that the objection would likely have been sustained; and (3) success would have changed the trial's outcome. *See generally* ***State v. Saunders***, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Defendant again assigns error to conduct isolated from the context establishing its reasonableness. Earlier in the testimony of the victim's father (Dysert), the court overruled counsel's hearsay objection to his explanation of the events precipitating the police investigation of defendant's case. 3RP 147. Dysert was permitted to explain he called the Sheriff immediately after C.D. disclosed the existence of a sexual relationship with defendant without asking her for additional details. 3RP 148. The unobjected to (but now challenged) question sought a "yes" or "no" answer to explain that conduct. 3RP 149. Dysert's statement more

details about his daughter's molestation would have resulted in uncontrollable aggression was non-responsive. *Id.*

Defendant cannot establish the absence of a legitimate tactical reason to refrain from interposing a second objection during the continuation of the same line of questioning already allowed over her first objection. It is also a legitimate trial tactic to withhold objections likely to emphasize damaging or inadmissible evidence. *See* ***In re Davis***, 152 Wn.2d 647, 714, 101 P.3d 1 (2004)(citing *see e.g.*, ***State v. Donald***, 68 Wn.App. 543, 551, 844 P.2d 447 (1993)). Counsel better addressed Dysert's emotional response in closing argument as an understandable reaction of a caring parent to troubling information he could not know to be true. 4RP 245-47. The assignment of error is secondarily defeated by the low probability of the omitted objection's success as to *the question actually posed* by the prosecutor given the court's earlier ruling. Dysert's decision to report C.D.'s abuse to police was *res gestae* admissible to explain the events leading to defendant's arrest. *See* ***State v. Briejer***, 172 Wn. App. 209, 227, 289 P.3d 698 (2012). While his motivation for reporting the abuse with limited information was admissible as relevant to the jury's assessment of his credibility. *See* ***State v. Lubers***, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996).

f. Defendant's criticism of counsel's conduct at sentencing does not prove ineffective assistance.

Defendant mischaracterizes counsel's level of preparedness at sentencing. She endeavored to send the court a presentence report by the same electronic means utilized by the State. RP (5/12) 16, 19. There is nothing in the record establishing the transmission failure was anything more than an unfortunate technological mishap. Defendant provides no authority for the proposition written briefing was necessary, or proof the absence of written briefing adversely affected the sentence. Counsel represented she was "versed ... prepared to go forward ... [and] ready to argue". RP (5/12) 17. She then successfully advocated for a more lenient sentence than the 600 months proposed by the State. RP (5/12) 23, 27-28, 34. Defendant claims counsel neglected to provide any information about his life, yet his extensive criminal history suggests a better understanding of his life was more prone to inspire severity than leniency on the part of the court. RP (5/12) 32-34. A prejudicial deficiency has not been shown.

g. Defendant failed to prove any prejudice.

Prejudice only exists if there is a reasonable probability the result of the proceeding would have been different but for counsel's deficient

performance. *See* ***State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, *cert denied*, 497 U.S. 922 (1986); ***State v. Neff***, 163 Wn.2d 453, 466, 181 P.3d 819 (2008).

Most of defendant's claims read like an indictment upon counsel's professionalism without actually articulating prejudice. Other claims are beyond review because they depend on speculative facts outside the record. What remains is capable of being explained in terms of tactics or strategy, and incapable of affecting the outcome of the trial given the jury's evident belief in C.D.'s testimony. *See supra* p. 3-8.

h. Defendant failed to prove counsel's overall performance was ineffective.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***Cronic***, 466 U.S. at 656. For "[t]he essence of an ineffective assistance claim is ... counsel's unprofessional errors so upset the adversarial balance between defense and prosecution ... the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

Counsel ably represented defendant from pretrial motions to post-sentence proceedings. *E.g.*, 1RP 19; 2RP 35, 38, 44, 49, 61; 3RP 93, 115, 124-25, 129, 147, 149, 157, 187; 4RP 206, 209, 245-47; (5/12) 28-29; (5/16) 50-51; CP 6-9, 16-17, 90-91. She filed motions, subjected the

State's case to adversarial testing, interposed objections, proposed instructions, as well as argued the evidence on defendant's behalf at motions, trial, and sentencing. *Id.* Defendant's meritless ineffective assistance of counsel claims should be rejected.

3. DEFENDANT'S UNPRESERVED CHALLENGE TO THE COURT'S PETRICH INSTRUCTION IS MERITLESS GIVEN THE JURY'S ACCURATE INSTRUCTIONS ON HOW TO DECIDE DEFENDANT'S CLEARLY DISTINGUISHED COUNTS OF CHILD RAPE.

There is no unanimity problem attending convictions in multiple acts cases where several acts could form the basis of one count charged where the jury is instructed it must unanimously agree beyond a reasonable doubt on a specific criminal act for each count. ***Petrich***, 101 Wn.2d at 572. A challenged jury instruction is reviewed *de novo* "in the context of the instructions as a whole", which "are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." ***State v. Kuntz***, 161 Wn. App. 395, 403, 253 P.3d 437 (2011)(citing ***State v. Benn***, 120 Wn.2d 631, 654–55, 845 P.2d 289 (1993); ***State v. Aguirre***, 168 Wn.2d 350, 363–64, 229 P.3d 669 (2010)). Issuance of a misleading instruction will not result in reversal unless the defendant proves resulting prejudice. *Id.*

Defendant's jury received a case-specific version of the most recently approved WPIC 4.25 instruction on unanimity:

> "The State alleges that the defendant committed acts of Rape of a Child in the Second Degree on multiple occasions. To convict the defendant on any count of Rape of a Child in the Second Degree, one particular act of Rape of a Child in the Second Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Rape of a Child in the Second Degree." CP 44 (Instr.13).

The instruction was approved in ***State v. Moultrie***, 143 Wn. App. 387, 392-94, 177 P.3d 776 (2008), and more clearly describes unanimity than the version of the instruction criticized in ***State v. Watkins***, 136 Wn. App. 240, 243-44, 148 P.3d 1112 (2006), on which defendant's unpreserved challenge to his instruction mistakenly relies. App.26.

a. Defendant failed to preserve this claim of instructional error by accepting the challenged instruction without exception.

Any claim of instructional error on appeal is generally waived by a failure to object to the instruction below. ***State v. Knight***, 176 Wn. App. 936, 951, 209 P.3d 776 (2013). A defendant may only raise an unpreserved instructional irregularity on appeal if he proves it to be manifest error affecting a constitutional right. *Id.* (citing ***State v. O'Hara***, 167 Wn.2d 91, 98–99, 217 P.3d 756 (2009); RAP 2.5(a)(3)); ***State v.***

Kuntz,161 Wn. App. 395, 406, 253 P.3d 437 (2011); ***State v. Corbett***, 158 Wn. App. 592, 242 P.3d 52 (2010)(citing CrR 6.15(c)).

Characterizing an alleged error as affecting a constitutional right does not automatically meet the narrowly construed RAP 2.5(a)(3) threshold for reviewing unpreserved claims on appeal. ***Kuntz***, 161 Wn. App. at 406-07 (citing ***O'Hara***, 167 Wn.2d 91, 98–99, 217 P.3d 756 (2009); ***Watkins***, 136 Wn. App. at 245 n.14 (court proceeded to merits where State did not challenge the manifest quality of the identified error). "Manifest" error requires a showing of "actual prejudice," which appellate courts assess by looking for "practical and identifiable consequences" of the alleged error at trial. ***Knight***, 176 Wn. App. at 951(citing ***State v. Gordon***, 172 Wn.2d 671, 676, 260 P.3d 884 (2011); ***State v. Montgomery***, 163 Wn.2d 577, 595, 183 P.3d 267 (2008)). "Manifest" "normal[ly] means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed." ***State v. Lynn***, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)(citing ***State v. Taylor***, 83 Wn.2d 549, 596, 521 P.2d 699 (1974)). "An expansive reading of 'manifest' sends a message to trial counsel not to worry about overlooking constitutional claims, since such claims can always be asserted on appeal. Indeed, sophisticated defense counsel may deliberately avoid raising issues which have little or no significance to the jury verdict but may be a basis for a successful appeal ... [I]t is [therefore] important ... 'manifest' be a meaningful and operational screening device

if [appellate courts] are to preserve the integrity of the trial and reduce unnecessary appeals." ***Lynn***, 67 Wn. App. at 343.

Defendant failed to establish manifest error implicating his constitutional right to jury unanimity as he fails to make any showing of actual prejudice resulting from the ***Petrich*** instruction he now characterizes as ambiguous. *See* ***Knight***, 176 Wn. App. at 951; ***Corbett***, 158 Wn. App. at 592. His jury received the current version of WPIC 4.25. CP 44. The instruction was approved in ***Moultrie***, 143 Wn. App. at 392-94. And even the ***Watkins*** case, on which defendant exclusively bases his challenge, conceded a similarly albeit less-clearly drafted version of WPIC 4.25 satisfied the constitutional requirements prescribed for the instruction in ***State v. Noltie***. *See* 136 Wn. App. 240 (applying 116 Wn.2d 831, 833, 809 P.2d 190 (1991)). There was no manifest error in the trial court similarly concluding WPIC 4.25 was an accurate statement of the prevailing law on unanimity. A defendant should not be able to challenge on appeal a patently lawful instruction which could have been readily tailored to the defendant's reasonable preferences at trial had a timely objection been made. *See* ***Corbett***, 158 Wn. App. at 592.

b. Any reasonable juror would have known it must find separate and distinct acts for each of defendant's four guilty verdicts.

Defendant's untimely textual challenge to WPIC 4.25's instruction on unanimity is squarely analogous to the argument this Court rejected in

Corbett. 158 Wn. App. at 592-93. There, as here, the four separate "to-convict" instructions listed all the required elements of each child rape. *Id.*; CP 45 (Instr.14), 46 (Instr. 15), 47 (Instr. 16), 48 (Instr. 17). In both cases the jury was further instructed:

> "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." *See Id.*; CP 38 (Instr.7)(WPIC 3.01).

Those instructions were then supplemented with a Supreme Court Committee approved ***Petrich*** instruction explaining the unanimity requirement. *Id.*; CP 44 (Instr.13)(WPIC 4.25). Each trial was also focused on evidence distinguishing the characteristics of the multiple offenses at issue. In defendant's case, C.D. described at least four rapes separated by time, or time and location, *i.e.*: two in defendant's trailer, one in her bedroom, one on the concrete floor of defendant's garage, and one in two separate rooms of his house. 3RP 99-104; 106-10, 128, 133-34, 144. She then provided legally sufficient general testimony describing ten separate rapes in the garage and twelve separate rapes in two separate rooms of his house. 3RP 107, 109-10, 144. Like ***Corbett***, the closing arguments unmistakably connected the trial evidence of at least four separate incidents to the four separate "to-conviction" instructions. 4RP 235-38, 242, 249, 255-57. Thus, in both cases, "[r]eading all the jury instructions and reviewing the evidence along with the ... closing arguments, any

reasonable jury would have known ... it must find separate and distinct acts of each of the four guilty verdicts ... entered." *See Id.* at 593. So just like Corbett, defendant failed to prove prejudicial instructional error. "Moreover, where, as here, the context of the presentation of the evidence and argument ... eliminates a strained prejudicial reading of an instruction, the jury's verdict is clear [so] any error is harmless." *Id.* at 593.

4. THIS COURT SHOULD REJECT THE UNPRESERVED CLAIM AN OPINION ABOUT THE VICTIM'S VERACITY WAS EXPRESSED BY HER FATHER'S RES GESTAE EXPLANATION FOR WHY HE DID NOT ASK HIS CHILD TO DESCRIBE HER RAPES IN DETAIL BEFORE CALLING THE POLICE.

Although witnesses may not express their opinions on whether another witness is telling the truth, they may provide *res gestae* testimony to explain the series of events leading to the defendant's arrest in order to complete the story of the crime on trial through proof of its immediate context. ***State v. Casteneda–Perez***, 61 Wn. App. 354, 360, 810 P.2d 74, *rev.denied*, 118 Wn.2d 1007 (1991); ***Grier***, 168 Wn. App. 635, 646, 278 P.3d 225 (2012); *see* ***State v. Pugh***, 167 Wn.2d 825, 835, 225 P.3d 892 (2009); ***State v. Warren,*** 143 Wn. App. 44, 63, 138 P.3d 1081 (2006)(evidence of the timing and context of child victim's disclosure of sexual abuse admissible *res gestae*). A fact bearing on the credibility or probative value of other evidence is relevant. *Id.* (citing ***State v. Rice***, 48 Wn. App. 7, 12, 737 P.2d 726 (1987); (ER 401). The decision whether to

admit *res gestae* evidence is a matter left to the trial court's discretion, which will not be overturned unless it was manifestly unreasonable or based on untenable grounds. ***Grier***, 168 Wn. App at 650; ***State v. Athan***, 160 Wn.2d 354, 382, 158 P.3d 27 (2007).

Defendant assigns error to the non-responsive testimony adduced from the victim's father through the unobjected to question:

> STATE: "Is it fair to say that you don't want additional details because you may not be able to control your anger or rage, if you found out about them?

Instead of limiting the answer to the "yes" or "no" response the question called for, the witness stated:

> DYSERT: Yes, my baby girl was a victim of child molestation. If I find out details, I'm not in control of myself at that point."

The record shows the State's question sought clarification of Dysert's earlier testimony he called the sheriff immediately after C.D.'s disclosure without further inquiry because he "d[idn]'t want to know details." 3RP 148. Defendant did not object to the question or testimony, but proceeded to cross-examination aimed at discrediting the disclosure's veracity. 3RP 149, 160-63.

a. Defendant's unpreserved evidentiary objection should not be reviewed as it does not raise manifest error affecting a constitutional right.

Normally appellate courts do not review claims of error raised for the first time on appeal, and defendant did not object to the allegedly objectionable testimony at trial. RAP 2.5(a); ***Montgomery***, 163 Wn.2d at 595–96 (quoting ***State v. Kirkman***, 159 Wn.2d 918, 937, 155 P.3d 125 (2007)). A limited exception exists for "manifest error[s] affecting a constitutional right." RAP 2.5(a)(3). While improper opinion testimony may infringe on a defendant's constitutional right to a jury trial, the admission of such testimony is not manifest within the meaning of RAP 2.5(a)(3) if the trial court properly instructs the jury's they "are the sole judges of the credibility of witnesses, and ... are not bound by ... witness opinions." ***Montgomery***, 163 Wn.2d at 595–96, 183 (quoting ***Kirkman***, 159 Wn.2d at 937); ***State v. Curtiss***, 161 Wn. App. 673, 697, 250 P.3d 496 (2011); *See also* ***State v. King***, 131 Wn. App. 789, 130 P.3d 376 (2006) (indirect references to victim's credibility not manifest error), *rev. denied*, 160 Wn.2d 1019, 163 P.3d 793 (2007); ***State v. Madison***, 53 Wn. App. 754, 770 P.2d 662 (1989).

The trial court gave the instructions necessary to cure the error defendant alleges while defendant makes no showing to overcome the

presumption they were followed. CP 31 (Instr.1), CP 35 (Instr.4). The jury was also provided a defense-requested limiting instruction to restrict the jury's consideration of the conversation that prompted Dysert to ask C.D. about the abuse. CP 37 (Instr.4). Defendant's unpreserved claim of evidentiary error should not be reviewed.

b. Neither the State's question nor Dysert's response expressed an opinion about C.D.'s veracity.

The steps Dysert took to bring the reported rape to law enforcement's attention was *res gestae* admissible to establish the background events leading to defendant's arrest. *See* ***Briejer***, 172 Wn. App. at 227. Dysert's motivation for responding the way he did was likewise admissible as relevant to the jury's assessment of his credibility. *See* ***Lubers***, 81 Wn. App. at 623. Dysert's unqualified statement he did not want to know the details of his daughter's molestation might have caused jurors to unduly perceive him as a disinterested parent undeserving of their trust in other matters. So it was appropriate to give him an opportunity to explain that decision was motivated by the perceived need to temper protective instincts tied to his sense of parental devotion. *See* ***Warren,*** 143 Wn. App. at 63. Had the jury mistook Dysert's devotion for disinterest, it might have unfairly suspected C.D.'s disclosure to be a desperate attempt for her father's attention.

Dysert's statement his baby girl was a victim of child molestation must also be put in context to understand how the certainty it expressed was based on more than his belief in the truth of C.D.'s disclosure. He took C.D. to the medical examination where a rare transection of her hymen consistent with vaginal intercourse was discovered. 3RP 148, 181, 183-84, 187. The challenged response was not adduced until after Dysert described his presence at that exam. 3RP 148, 149, 186. Since his expression of certainly in the truth of the sexual abuse was not dependant on C.D.'s disclosure, it was not necessarily intended or received as an indirect expression of confidence in her veracity. To the extent the statement was improper, it was harmless, since a properly instructed jury comprised of qualified adults would not be surprised or influenced by the fact a father would assume the truth of unobserved sexual abuse reported by his mentally disabled child. The jury, presumed to have followed its instructions, must have convicted defendant based on evidence other than the challenged remark.

5. THE JURORS COULD HAVE REASONABLY INFERRED DEFENDANT'S KNOWLEDGE OF C.D.'S PARTICULAR VULNERABILITY FROM HIS FOUR MONTH SEXUAL RELATIONSHIP WITH HER AND THEIR OWN OBSERVATION OF HER DEMEANOR WHILE TESTIFYING.

A trial court may impose an exceptional sentence based on a jury's finding the defendant "knew or should have known ... the victim ... was

particularly vulnerable...." RCW 9.94A.535(3)(b). To prove the vulnerable victim aggravator the State must show the defendant knew or should have known of the victim's particular vulnerability, and the vulnerability was a substantial factor in accomplishing the crime. ***State v. Suleiman***, 158 Wn.2d 280, 291–92, 143 P.3d 795 (2006). Appellate courts review the evidence of an aggravating factor in the light most favorable to the State to determine whether any rational trier of fact could have found the aggravator's presence beyond a reasonable doubt. ***State v. Yates***, 161 Wn.2d 714, 752, 168 P.3d 359 (2007).

a. The evidence of C.D.'s mental disability supported a reasonable inference of her particular vulnerability.

To be a substantial factor in a defendant accomplishing an offense, the victim's disability must have rendered the victim more vulnerable to the particular offense than a nondisabled victim would have been. ***State v. Mitchell***, 149 Wn. App. 716, 724, 205 P.3d 920 (2009) aff'd, 169 Wn.2d 437, 237 P.3d 282 (2010).

The evidence established C.D. was a "developmentally disabled" twelve year old special education elementary school student with a speech impediment, who often obviously functioned at the developmental level of a nine year old. 3RP 90, 144-46, 177-78. The disability rendered C.D. incapable of comprehending basic concepts without others figuring out special ways of explaining them to her. 3RP 145-46. Meanwhile, her

difficulty communicating with others resulted in her being held back in school, and manifested over the four months in which the rapes occurred through her repeated inability to ask others for help. 3RP 99, 130, 133, 145. At trial, the jury witnessed her inability to spell her own brother's last name, as well as observed her demeanor while testifying. 3RP 90. And appellate courts defer to the juries as to factual determinations based on their observation of testifying witnesses. *See* ***State v. Hanson***, 126 Wn. App. 267, 280-81, 108 P.3d 177 (2005). Defendant's properly instructed jury had all the information it needed to rationally conclude C.D. was more vulnerable to molestation and rape than a twelve year old child without her cognitive limitations. CP 55-62 (Instr.23-30).

b. The evidence established defendant knew or should have known of C.D.'s disability based on his relationship with her family and his contact with her over the four month offense period.

A defendant's knowledge of a victim's particular vulnerability may be inferred from the defendant's prior contact with the victim before choosing her for the charged offense. ***State v. Sims,*** 67 Wn. App. 50, 60, 834 P.2d 78 (1992). A person knows or acts with knowledge with respect to a fact when he is aware of the fact. If a person has information that would lead a reasonable person in the same situation to believe a fact exists, the jury is permitted to find he acted with knowledge of the fact. CP 62 (Instr. 30).

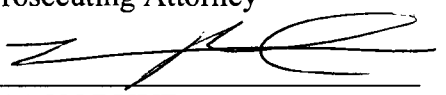
The evidence established defendant had an involved relationship with C.D.'s family over the course of at least four months, during which he periodically stayed in her home. 3RP 94-99, 134, 141-44, 163, 176. He spent time alone with her while driving her to his house for sex, as well as during the approximately ten minutes he took to rape her on about twenty five occasions. The jurors could have rationally inferred defendant could not have helped but been aware of C.D.'s cognitive disabilities over the course of so much contact. *See* 3RP 145-46. They very well may have reached such a conclusion in part through their own observations of C.D.'s disabilities while testifying. While defendant's act of telling C.D. "he would teach [her] everything he has to" could have been reasonably interpreted by them as reflecting actual knowledge, he was dealing with a limited child particularly susceptible to his control. The vulnerable victim aggravator was more than adequately supported.

D. CONCLUSION.

Defendant was justly convicted based on the properly instructed jury's rational assessment of verdict supporting admissible evidence he was able to challenge through constitutionally effective assistance of counsel.

DATED: February 5, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

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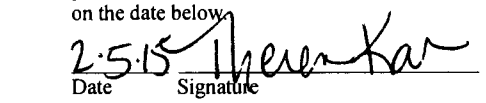
2-5-15 
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